

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
MAR 1 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of)	
)	
Review of the Commission's)	MM Docket No. 98-204
Broadcast and Cable)	
Equal Employment Opportunity)	
Rules and Policies)	
and Termination of the)	MM Docket No. 96-16
EEO Streamlining Proceeding)	
_____)	

COMMENTS OF AMERITECH NEW MEDIA, INC.

George Callard
Ameritech New Media
300 South Riverside Plaza
Suite 1800 North
Chicago, Illinois 60606
(312) 526-8572

Christopher Heimann
Counsel for Ameritech
1401 H Street, NW
Suite 1020
Washington, DC 20005
(202) 326-3817

March 1, 1999

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. RECRUITMENT AND RELATED REPORTING REQUIREMENTS	2
a. Recruitment and Reporting Requirements Should be Focused on Upper Level Employees Only	2
b. Rules Should Encourage Large Number of Recruitment Sources	5
c. Employee Referrals from Employee Organizations Should be Included as Recruitment Sources.....	6
II. THE PROPOSED RECORDKEEPING REQUIREMENTS SHOULD BE MODIFIED	7
a. The Commission Should Recognize That Employers Cannot Accurately Track Certain Information	7
b. Electronically Stored Evidence of Recruitment Efforts Should be Sufficient	9
II. FORM 395-A SHOULD BE MODIFIED, AND ELIMINATED WHERE REDUNDANT INFORMATION IS AVAILABLE TO THE COMMISSION	9
a. The Commission Should Permit Operators to File FCC Form 395 or EEO-1 Forms in Place of Form 395-A	9
b. Self-Assessment Review Should be Included as Part of Form 395-A	11
V. CONCLUSION	11

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Commission's)	MM Docket No. 98-204
Broadcast and Cable)	
Equal Employment Opportunity)	
Rules and Policies)	
and Termination of the)	MM Docket No. 96-16
EEO Streamlining Proceeding)	
_____)	

COMMENTS OF AMERITECH NEW MEDIA, INC.

Ameritech New Media, Inc. ("Ameritech") respectfully submits these comments in response to the Notice of Proposed Rule Making, FCC 98-305, released in the above-captioned docket on November 20, 1998 ("Notice").

I. Introduction

Ameritech has long been committed to seeking, hiring, retaining and promoting women and minorities and to promoting diversity in the workplace because it recognizes that affording equal employment opportunity to all segments of the population is essential to ensure that it continues to have a highly skilled, talented and motivated workforce. Promoting equal employment opportunity thus is critical to Ameritech's success in today's increasingly competitive marketplace. For this reason, Ameritech supports the Commission's objective of modifying its EEO rules to promote equal employment opportunity by emphasizing outreach in recruitment to all qualified job candidates, consistent with the D.C. Circuit's *Lutheran Church* decision.¹ Notice, FCC 98-305 at para. 6.

¹ *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998) (*Lutheran Church*).

Ameritech also welcomes the Commission's commitment, consistent with the deregulatory objectives of the Telecommunications Act of 1996 ("1996 Act"), to minimize to the greatest extent possible the administrative burdens imposed on regulated entities by its EEO rules.² To this end, Ameritech believes that the Commission can streamline its EEO recruitment, recordkeeping and reporting requirements without in any way sacrificing its EEO objectives. Modifying the Commission's cable EEO rules as Ameritech proposes will encourage cable operators to recruit and hire minorities and women and, at the same time, reduce regulatory burdens on operators.

II. Recruitment and Related Reporting Requirements

a. Recruitment and Reporting Requirements Should be Focused on Upper Level Employees Only.

In the *Notice*, the Commission asserts that it continues to believe that it has authority to establish EEO outreach/recruitment requirements, and that such requirements further the public interest goal of diversity of programming (both independently and by enhancing the prospects for female and minority ownership), notwithstanding the D.C. Circuit's decision in *Lutheran Church*.³ The Commission further asserts that its broadcast EEO recruitment requirements have traditionally focused on a licensee's efforts to recruit females and minorities for all full-time positions, rather than just upper-level positions, because it believes that all positions may influence programming.⁴ The

² See *Notice*, FCC 98-305 at para. 1.

³ *Id.* at para. 25.

⁴ *Id.* at 69. Although the Commission addresses this issue primarily in relation to broadcast stations, it recognizes that any changes to its broadcast EEO rules to comply with the *Lutheran Church* decision should apply equally to its cable EEO rules to ensure that they can withstand constitutional scrutiny. *Id.* at para. 46. Ameritech's comments herein are limited to the Commission's proposals to modify its cable EEO rules.

Commission proposes to continue this policy, but asks whether recruitment requirements should be limited to upper-level positions (or only to positions that have a direct influence on programming) in light of the court's analysis in *Lutheran Church* that lower-level employees cannot influence program diversity.⁵

Ameritech believes that any mandatory recruitment and reporting requirements should be limited only to upper-level employees, who might directly influence programming decisions. In *Lutheran Church*, the court found that the “only possible statutory justification for the Commission to regulate workplace discrimination would be its obligation to safeguard the ‘public interest,’” which, under Supreme Court precedent, limits the Commission’s authority only to measures related to its specific statutory charge.⁶ As a consequence, the court observed, the Commission appears only to have authority to adopt antidiscrimination and other EEO requirements that affect a “communications service,” which in this case “means programming.”⁷ The court further held that, insofar as the Commission’s broadcast EEO rules applied to all station employees, they could not pass muster under the substantial relation prong of intermediate scrutiny, let alone the narrow tailoring prong of strict scrutiny, since the Commission had adduced no evidence linking low-level employees to program content.⁸

⁵ *Id.* at para. 69.

⁶ *Lutheran Church*, 141 F.3d at 354 (*emphasis added*) (noting that the Supreme Court has held that an agency may pass antidiscrimination measures under its public interest authority only insofar as discrimination relates to the agency’s specific statutory charge).

⁷ *Id.* As the court noted, “the FCC is not the Equal Employment Opportunity Commission.” *Id.*, citing *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 628 (D.C. Cir. 1978) (*en banc*).

⁸ *Id.* at 356.

Under *Lutheran Church*, therefore, the Commission may adopt EEO or other workplace antidiscrimination requirements applicable to cable operators and broadcasters only insofar as they specifically enhance programming diversity. Thus, it may adopt such requirements only with respect to upper-level positions likely to affect programming decisions.⁹ Because, as the court recognized, low-level employees simply have no influence on programming decisions, the Commission should not, and indeed cannot consistent with *Lutheran Church*, impose EEO outreach and recruitment obligations on cable operators with respect to low level positions.¹⁰ As a consequence, the Commission should amend its cable EEO recruitment and outreach requirements to apply only to those upper-level positions that can directly influence programming decisions, and therefore program diversity.¹¹

The Commission also should modify its cable EEO reporting requirements to conform to any changes made in its recruiting and outreach requirements. Because, as the court found in *Lutheran Church*, the Commission is not the Equal Employment

⁹ As the Commission recognizes, although *Lutheran Church* did not directly address the Commission's cable EEO requirements, the court's analysis applies equally to the Commission's regulation of the cable industry. See *Notice*, FCC 98-305 at para. 46.

¹⁰ The Commission suggests that low-level positions are often a stepping stone, providing a way for persons with no experience to enter the broadcast and cable industries and obtain experience necessary to advance to higher level positions that could affect programming decisions, or obtain financing to pursue ownership opportunities. While some entry or low-level positions may provide a stepping stone to higher level positions (a proposition for which neither the Commission nor anyone else has offered any evidence), that would only justify outreach or other requirements directed specifically at such positions. Thus, before the Commission could adopt EEO requirements with respect to low-level positions, the Commission would first have to establish which specific positions (or types of positions) are likely to lead to advancement to positions likely to affect programming decisions, and that the benefits of imposing EEO requirements with respect to such positions exceeds the burden imposed on cable operators and broadcasters.

¹¹ As discussed below, Ameritech is committed to notifying a broad range, and indeed an ever-growing number, of recruiting sources for *all* job openings, not just upper-level management positions likely to affect programming choices. The Court's ruling in *Lutheran Church*, however, precludes the Commission from imposing EEO requirements (including outreach, recordkeeping, and reporting obligations) with respect to lower-level employees.

Opportunity Commission (“EEOC”), and thus lacks general authority to regulate workplace discrimination,¹² the Commission should not impose reporting requirements encompassing all of a cable operator’s employees. Rather, consistent with the limitations on the Commission’s authority to regulate workplace discrimination only in so far as it affects programming,¹³ the Commission should modify its cable EEO reporting requirement (FCC Form 395-A) to apply only to positions that can directly influence programming and program diversity.¹⁴ Consequently, the Commission should no longer require cable operators to report EEO information with respect to *all* employees, including those with little or no decision-making authority or who are entirely removed from programming matters.

b. Rules Should Encourage Large Number of Recruitment Sources.

Ameritech agrees with the Commission that active recruitment efforts are important to enable a business enterprise to draw on a wide pool of potential applicants in order to obtain a highly talented and motivated workforce.¹⁵ For this reason, Ameritech contacts a broad range of minority- and female-oriented recruiting sources, in addition to general sources, for referrals for all job openings.¹⁶ Ameritech, therefore, supports the Commission’s proposal to require cable operators to contact a minimum number of

¹² *Lutheran Church*, 141 F.3d at 354.

¹³ *Id.* at 354.

¹⁴ As discussed below, Ameritech believes that the Commission should further streamline its cable EEO reporting requirements, consistent with the deregulatory objectives of the 1996 Act and the Paperwork Reduction Act, to eliminate redundant reporting obligations. *See infra* text accompanying note 22.

¹⁵ *Notice*, FCC 98-305 at para. 61.

¹⁶ For example, in Chicago, Ameritech New Media currently posts notices with thirty-four minority- and female-oriented recruiting sources for *all* job openings.

minority- and female-oriented recruiting sources for all openings for positions subject to Commission recruitment requirements – that is, those that could affect programming decisions.

Ameritech is, however, concerned about the Commission's proposal to continue to require cable operators to identify and replace unproductive recruiting sources because it is often difficult to identify additional, productive sources within a fixed reporting period. Moreover, an apparently unproductive source may, in the future, become a very productive source of referrals.¹⁷ For this reason, Ameritech's policy is to continue to notify all recruiting sources, regardless of past productivity, and to add new sources, as it becomes aware of them. As a consequence, Ameritech is assured that the widest possible pool of applicants is notified of all job openings. Thus, if the Commission requires cable operators to contact a minimum number of minority- and female-oriented recruiting sources for each job opening, it should not mechanically penalize operators, like Ameritech, that notify a vast number of sources, but do not routinely substitute apparently unproductive sources.¹⁸

c. Employee Referrals from Employee Organizations Should be Included as Recruitment Sources.

While Ameritech would support a requirement that it contact a minimum number of minority- or female-oriented recruiting sources (including a separate minimum number of *outside* sources) for each opening for positions subject to Commission recruitment

¹⁷ In addition, requiring cable operators to replace unproductive sources will create perverse incentives to notify only the bare minimum number of recruiting sources so that a cable operator will have additional sources in reserve in case one or more recruitment sources prove to be unproductive and have to be replaced.

¹⁸ Nor should the Commission penalize a cable operator that elects to drop unproductive sources without replacement, so long as the operator continues to notify at least the minimum number of sources mandated by the Commission's rules.

requirements, it does not support the Commission's proposal to exclude all employee or client referrals from the number of minimum sources. Ameritech routinely contacts employee organizations, such as the Ameritech Black Advocacy Panel and the Ameritech Hispanic Advisory Panel, for employee referrals. Referrals from organizations like these do not threaten to create or maintain a homogenous workforce, and therefore should not be excluded from the minimum number of minority-oriented recruiting sources. If the Commission decides to exclude employee referrals, it should exclude only referrals from individual employees, rather than minority or female employee organizations.

III. The Proposed Recordkeeping Requirements Should be Modified

a. **The Commission Should Recognize That Employers Cannot Accurately Track Certain Information.**

The Commission also invites comment on its proposal to continue to require cable operators to retain records to prove that they have made good faith efforts to broaden their applicant pools for job openings.¹⁹ In particular, it asks whether it should require operators to track the race, ethnic origin, and gender of all applicants generated by each recruiting source for each job vacancy so that operators can monitor the effectiveness of their recruitment sources and change them, if necessary.²⁰

If the Commission adopts such a requirement, it should limit it to applicants and employees who volunteer such information because it is virtually impossible for employers to accurately track the race, ethnic origin and gender, let alone the source, of all job applicants. Employers routinely receive large numbers of resumes and inquiries

¹⁹ Notice, FCC 98-305 at para. 73.

²⁰ *Id.* The Commission stated that, without such records, it would be unable to ascertain whether an entity is making a sincere effort to recruit minorities and women into its applicant pools. *Id.*

for job postings without any indication of the source, race, gender or ethnic origin of the applicant. Many such applications or inquiries are by persons who are unqualified for the posted position, and therefore will be rejected before the employer can ascertain the source, or other information about the applicant. For this reason alone, records concerning the race, gender and ethnic origin of applicants generated by each source are inherently incomplete and inaccurate.

And while all qualified, prospective employees are asked to fill out applications requesting information concerning the race, gender and ethnic origin of the applicant, as well as how he or she learned of the job opening, a response is not mandatory. Even once an applicant is hired, he or she cannot be required to disclose information about race or ethnic origin. Thus, any records would necessarily be unreliable.²¹ The Commission, therefore, should clarify that a cable operator is only required to track the race, ethnicity, gender, and recruiting source of applicants and employees who volunteer such information.

In any event, requiring operators to maintain records tracking the race, ethnic origin, gender and source of all job applicants would be utterly superfluous in the case of companies, like Ameritech, that contact a large, and indeed growing, number of minority- and female-specific, in addition to general, recruitment sources for all vacancies. Such companies can be presumed to be making a good faith effort to expand their applicant pools to include women and minorities, and should not have to incur the time and

²¹ Even if the Commission was to require cable operators to make a determination of race, gender or ethnic origin based on visual observation (as required under the EEO rules), such determinations would be of dubious value because they can be inaccurate. In addition, visual observations would, obviously, afford no information whatsoever about how or where the applicant or employee learned of the job opening. As a consequence, visual observations would not permit a cable operator to assess the effectiveness of recruitment sources, which is the sole justification offered by the Commission for requiring operators to track the race, ethnicity and gender of all applicants generated by each source.

expense of maintaining detailed, unnecessary records concerning the type and number of applicants derived from each recruitment source.

- b. Electronically Stored Evidence of Recruitment Efforts Should be Sufficient.

The Commission should clarify that electronically stored records of EEO recruitment efforts (such as copies of e-mail notices of job openings to recruitment sources) are sufficient to satisfy any record retention requirements. As discussed above, Ameritech routinely notifies a large number of recruiting sources for all openings. Typically, these notices are transmitted electronically by e-mail, reducing the time and cost of posting job vacancies with a large number and broad range of recruitment sources. As a consequence, Ameritech does not have paper records reflecting all of the sources contacted for each position. The Commission should not require cable operators, like Ameritech, that transmit job notices electronically to create unnecessary paper records of such notices, but rather should permit them to maintain records electronically.

IV. Form 395-A Should be Modified, and Eliminated Where Redundant Information is Available to the Commission

- a. The Commission Should Permit Operators to File FCC Form 395 or EEO-1 Forms in Place of Form 395-A.

In the *Notice*, the Commission seeks comment on its proposal to continue to require cable operators to report annually on the total number of employees, as well as the number of minorities and women employed.²²

Although Ameritech questions the need for the Commission to continue to collect annual workforce data in light of the court's decision in *Lutheran Church* that the Commission may not directly or indirectly pressure regulated entities to make race-based

²² *Id.* at 77.

employment decisions, it does not, at this time, object to furnishing such data to the Commission. At the same time, however, Ameritech urges the Commission to minimize to the extent possible the burden of complying with its EEO reporting requirements by eliminating redundant reporting obligations, consistent with the deregulatory objectives of the Telecommunications Act of 1996 and the Paperwork Reduction Act. Specifically, Ameritech encourages the Commission to permit any cable operator required to file FCC Form 395, or an EEO-1 form with the Department of Labor, to file copies of such forms with the Cable Bureau in lieu of FCC Form 395-A. As the Commission has previously observed, the EEO-1 form requires the reporting of employment data substantially the same as that required by FCC Forms 395, except that it does not distinguish between full-time and part-time employees.²³ In light of the Commission's proposal to eliminate the requirement that cable entities report employment information with respect to part-time employees,²⁴ there is no longer any justification for not permitting such entities to satisfy their reporting obligations by filing an EEO-1 Form or FCC Form 395 with the Commission.²⁵

²³ See 1998 Biennial Regulatory Review – Amendment of Sections 73.3612 and 76.77 of the Commission's Rules Concerning Filing Dates for the Commission's Equal Employment Opportunity Annual Employment Reports, Memorandum Opinion and Order, FCC 98-39 at para. 3 (Rel. Mar. 16, 1998) (*March 1998 EEO Amendments*) (consolidating the reporting period for Form 395, 395-A and EEO-1). FCC Form 395 likewise requires reporting of essentially the same data as that required by FCC Form 395-A, including information specifically concerning part-time employees.

²⁴ Notice, FCC 98-305 at para. 76 (“we propose to require cable entities to report only full-time employees on Forms 395-A and 395-M, except for a listing of positions by job title”). To the extent the Commission believes it necessary to require cable entities to file a list of full- and part-time positions by job title, it could require entities that file an EEO-1 form or FCC Form 395 in lieu of Form 395-A to file such a list as a supplement to their filings.

²⁵ In its *March 1998 EEO Amendments* order, the Commission rejected NAB's request that broadcast stations be permitted to satisfy their EEO reporting obligations by filing a copy of their EEO-1 forms, instead of filing different forms with two separate agencies. The only justification offered for refusing this request was that the EEO-1 form did not disaggregate full- and part-time employment.

b. Self-Assessment Review Should be Included as Part of Form 395-A.

The Commission also proposes to require cable operators to conduct periodic self-assessments of their EEO programs, and asks how often such assessments should occur, as well as how the Commission should enforce such a requirement.²⁶ In order to minimize the paperwork and reporting obligations of cable operators, while at the same time enabling the Commission to monitor cable operator compliance with the Commission's EEO outreach and recruiting requirements, the Commission should incorporate self-assessment review requirements into FCC Form 395-A.²⁷ Specifically, the Commission should simply require cable operators to certify annually that they have complied with each aspect of the Commission's cable EEO requirements.²⁸ The Commission could, of course, conduct random audits, or audits in response to complaints, to verify compliance with the Commission's cable EEO rules.

V. Conclusion

Ameritech welcomes and supports the Commission's goal of modifying its broadcast and cable EEO rules to promote equal employment opportunity by emphasizing outreach in recruiting to all qualified job applicants. In implementing this goal, the Commission must remain mindful of its other, overarching objective of minimizing, to the extent possible, the administrative burden imposed by its regulations on regulated entities. Accordingly, Ameritech urges the Commission to adopt the

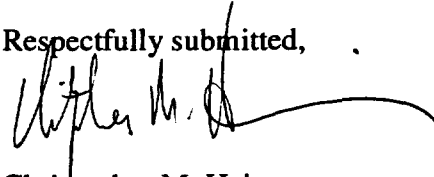
²⁶ Notice, FCC 98-305 at para. 72.

²⁷ Cable operators that file an EEO-1 form or FCC Form 395 in lieu of Form 395-A could file a supplemental form relating to self-assessment.

²⁸ For example, the Commission could continue to ask questions similar to those in Part III of Form 395-A. A negative response could, of course, require additional explanation of the cable operator's remedial efforts. Intentionally false responses would subject the operator to financial penalty.

proposed changes to its EEO requirements discussed herein, which will alleviate the cost and burden of complying with these requirements without sacrificing the Commission's EEO objectives.

Respectfully submitted,



Christopher M. Heimann
Ameritech
1401 H Street, N.W.
Suite 1020
Washington, D.C. 20005
(202) 326-3818

George D. Callard
Ameritech New Media, Inc.
300 South Riverside Plaza
Suite 1800 North
Chicago, Illinois 60606
(312) 526-8572

March 1, 1999